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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of)
Sections 3(n) and 332 of the) GN Docket
Communications Act) No. 93-252
)
Regulatory Treatment of Mobile Services)

To: The Commission

PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

SEIKO Telecommunication Systems, Inc. ("STS"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby submits a request for clarification and/or reconsideration with respect to just one word in the Commission's decision in the above-captioned docket, as set forth in the Second Report and Order (the "Order"), FCC 94-31 (released March 7, 1994), 59 Fed. Reg. 18493 (April 19, 1994).

I. BACKGROUND

In the Order, the FCC determined that, pursuant to amendments to the Communications Act of 1934, as amended (the "Act"), made by the Omnibus Budget and Reconciliation Act of 1993 (the "Budget Act"),^{1/} a number of mobile services that previously had been treated as private carrier services would be reclassified as commercial mobile radio services ("CMRS"), and would become subject to common carrier regulation after the expiration of a statutory

^{1/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat. 393 (1993).

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transition period. With respect to services provided over the subcarriers of FM radio stations, the Commission concluded that those services "that meet the definition of CMRS but have been regulated as private radio services, will . . . [become] subject to CMRS rules." Order, ¶ 260.

STS provides paging and related messaging services over FM subcarriers on a private carriage basis, as permitted by the Commission's Rules. See 47 C.F.R. § 73.295(b).^{2/} These services appear to meet the definition of CMRS. See id. § 20.9(a)(12). Thus, STS and other FM subcarrier paging providers will become subject to Title II common carrier regulation at the end of the statutory transition period, i.e., on and after August 10, 1996. See Order, ¶ 260.

In Appendix A to the Order, which sets forth new regulations that implement the Commission's decision, the Commission appears inadvertently to have created an ambiguity in the application of an element of Title III regulation, relating to the foreign ownership limitations of Section 310(b) of the Act. The first sentence of new Section 20.5(a) of the FCC's Rules, 47 C.F.R. § 20.5(a), states that the rule "implements Section 310 of the Communications Act, 47 U.S.C. § 310, regarding the citizenship of licensees in the commercial mobile radio

^{2/} STS's innovative service offerings involve the transmission of paging messages and a host of information services to a receiver that is integrated with the user's wristwatch.

services" (emphasis added). The second sentence of the rule, which contains the specific foreign ownership limitation, refers more broadly to "[c]ommercial mobile radio service authorizations" (emphasis added).

This apparently unintentional equation of the word "authorization" with the term "license" could have serious consequences for firms, such as STS, that have foreign ownership in excess of the limits set forth in Section 310(b) of the Act, 47 U.S.C. § 310(b). These firms lease FM subcarriers from broadcast licensees and do not themselves hold station licenses. Section 310(b) has not ever been applied to them.

As a common carrier, STS will have to seek FCC "authorizations" (but not licenses) for its FM subcarrier operations. See 47 C.F.R. § 73.295(b).^{3/} Because of the second sentence of Section 20.5(a) of the Rules, STS could now be viewed as subject to the foreign ownership restrictions of the Act -- based solely on the FCC's use of

^{3/} In FM Subsidiary Communications Authorizations, 53 R.R.2d 1519 (1983), on recon., 55 R.R.2d 1607 (1984), rev'd in part on other grounds sub nom. People of the State of California v. FCC, 798 F.2d 1515 (1986) (the "SCA Order"), the Commission determined that both common carrier and private carrier nonbroadcast services could be provided over FM subchannels, either by the FM station licensee or by its lessee. For lessees seeking to provide private carrier services through FM subchannels, the Commission determined that a notification letter from the lessee to the Private Radio Bureau would suffice. SCA Order, 53 R.R.2d at 1526 & n. 13. FM subcarrier lessees seeking to provide common carrier services through FM subchannels are required to submit an application for an "authorization" on Form 401. Id. at 1526.

the word "authorizations," rather than the word "licenses." Accordingly, believing that this use of "authorizations" was inadvertent in the context of Section 310(b), petitioner seeks a change in the word "authorizations" in Section 20.5(a) of the Rules, or alternatively FCC clarification regarding the inapplicability of Section 310(b) of the Act to FM subcarrier services.^{4/}

II. THE FOREIGN OWNERSHIP RESTRICTIONS WERE NOT INTENDED TO, AND SHOULD NOT, APPLY TO THOSE LEASING FM SUBCARRIERS AND HOLDING NO FCC LICENSE.

Section 310(b), by its terms, applies only to radio station licenses;^{5/} it does not restrict the extent to which FCC-licensed facilities may be used by aliens who are not themselves licensees. Because of this distinction between licensees and users of licensed facilities, the Commission has long held that the foreign ownership restrictions do not apply to parties that merely lease capacity from FCC licensees.^{6/}

^{4/} For the reasons set forth in the foregoing paragraphs, STS is clearly an "interested person" for purposes of 47 C.F.R. § 1.429(a). The new rule that is the subject of this petition represents a "circumstance . . . which [has] changed since the last opportunity to present [this matter] to the Commission." Id. § 1.429(b)(1).

^{5/} Section 310(b), 47 U.S.C. § 310(b), reads in relevant part (emphasis added):

"No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by"

^{6/} See, e.g., Satellite Business Systems, 95 F.C.C.2d 866, 873 & n.7 (1983); Satellite Transponder Sales, 90 F.C.C.2d 1238, 1257-58 & n.46 (1982), aff'd sub nom.

(continued...)

The lessee of an FM subcarrier does not hold a Title III license and has no FCC-granted right to use the radio spectrum. Instead, the subcarrier lessee is entirely dependent on a contract with the FM station licensee, which remains solely responsible for the operation of the licensed facilities and for complying with the requirements of Title III, including Section 310. See 47 C.F.R. § 73.295(c).^{2/} In discussing common carrier authorizations for FM subcarrier services, the Commission made clear that FM subcarrier users "would not be seeking approval for the technical facilities of the FM station or the subchannel"; rather, "only the use of the subchannel for nonbroadcast related purposes would be regulated in accordance with private radio or common carrier regulations." SCA Order, 53 R.R.2d at 1526 (emphasis added).

Perhaps the clearest expression of the inapplicability of Section 310(b) to FM subcarriers lies in the instructions for Form 401, which FM subcarrier providers must submit to the FCC to obtain common carrier authorization. These instructions state that subcarrier applicants need only complete certain items on the form,

^{6/} (...continued)

Wold Communications v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

^{2/} If the FM station loses its license, the FM subcarrier lessee's right to use the subcarrier also terminates. See SCA Order, 53 R.R.2d at 1526 & n.13 ("[t]he Commission regards FM subcarrier use as a secondary privilege that runs with the primary FM station license").

specifically not including item 12, which concerns compliance with Section 310(b).^{8/}

This longstanding FCC policy on FM subcarrier services and Section 310(b) was not changed by the passage in 1993 of the Budget Act. Congress recognized that the statute would be "broaden[ing] the range of services subject to limitations on foreign investment," but it also made clear that the "amendments in no way affect the Commission's authority under section 310(b)." H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 495 (1993). Congress did not purport to change the fundamental requirement of Section 310(b): that the statute's provisions apply only to those holding FCC "licenses."

III. CONCLUSION

STS believes that the Commission did not intend to make any revisions to the scope of Section 310(b) through its implementation of the Order. To avoid potential confusion, STS respectfully requests that the Commission change Section 20.5(a) of the Rules by replacing the word "authorizations" in the second sentence with the word "licenses." Alternatively, the Commission should reiterate

^{8/} The initial Public Notice announcing these instructions stated that this question should be marked "not applicable" for FM Subcarriers. FCC Will Accept FM Subchannel Applications for Common Carrier Services, No. 1754, at 2 (Jan. 10, 1984); see 55 R.R.2d at 1618 (noting that modified instructions to FCC Form 401 had been released that "take into account the unique aspects of [common carrier] services offered on FM subcarriers").

its guidance that Section 310(b) applies only to Title III licensees, and not to those holding FM subcarrier authorizations pursuant to Title II.

Respectfully submitted,

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